

may well include other things, the Summons which is the actual physical piece of paper which is the outward sign of the commencement of a suit or action. From that it would seem to follow that the word "document" used in Rule 1 and in Rule 2 is a piece of paper which is used in connection with and is part of a piece of paper which is a "proceeding". That is the conclusion to which I am driven to my view of the strict rules of construction, and I am fortified in it by the consideration that any other construction would be in conflict with the provisions of the later enacted Evidence Ordinance which in no case makes a certified translation a condition precedent to the admissibility of a document in evidence.

It is for this reason I am to say that the Magistrate was wrong in rejecting this book which was tendered. There were two courses open to him unless he rejected it on other grounds. One was to consider it forthwith with the aid of the Court interpreter; the other was to adjourn the proceedings to enable a formal translation to be prepared and, of course, such adjournment would have been at the expense of the party who had tendered it without a translation. He took neither of these courses and I have now to consider what is to be done in the circumstances.

This appeal is by way of re-hearing and in regard to it this Court has like powers and jurisdiction as the Court of Appeal has in the hearing of appeals from the High Court (Section 51, Courts Ordinance). By section 40 of the Courts Ordinance a new trial shall not be granted on the ground of improper admission or rejection of evidence unless in the opinion of the Court of Appeal some substantial wrong or miscarriage of justice has been thereby occasioned. Here, I have held there has been an improper rejection of evidence.

That evidence, however, is documentary. I have seen it, and I am in as good a position as would be any Magistrate to form some opinion as to its worth. Having examined it, I am satisfied that had the Magistrate considered it, it could have had one effect and one effect only on his mind and that effect would have been to fortify him in disbelieving the evidence of the defendant.

The book is not in any sense of the word an ordinary commercial book of account. It consists of 9 or 10 pages, all of them except the page dealing with this transaction, of a rather scrappy nature, and none of them except the page dealing with this transaction containing any entry prior to 1952. The page relating to this transaction contains 16 entries bearing a series of dates, commencing on 1st September, 1951, and ending on 13th January, 1953, that is, extending over

a period of 18 months, and the whole series having obviously been written at one and the same time.

To be fair to the appellant I must not forget that he himself made no attempt to produce this book until the Magistrate himself raised the question of its existence. To my mind, it has every appearance of a memorandum made up at one time at a fairly recent date to cover a series of transaction which, as I have said, are alleged to have extended over 18 months. It may well be, and I am always prepared to prefer an innocent explanation to a guilty one, that it was composed as nothing more than a sort of *aide memoire*. Regarded as a book of account, however, it is valueless.

The appeal is dismissed with costs.

*Appeal dismissed.*

Solicitor for the appellant: S. M. Sharma.

Solicitors for the respondent: Das & Co.

### ***In re* JASPER BERTRAM YOUNG, DECEASED.**

[O. C. J. (Wilson, J.) January 22, 1954]

[K.L. — Originating Summons No. 137 of 1952]

*Estate Duty Enactment, s. 43(4) — Private Limited Company — Valuation of shares on death of shareholder — Articles of Association — Director's remuneration under.*

In this matter, two points arose for consideration with regard to estate duty payable on the estate of the deceased in the Federation of Malaya, namely:—

- (1) the value of 2,500 ordinary shares in the Company at the date of the death of the deceased;
- (2) the additional director's remuneration to which the deceased's estate is entitled.

**Held:** (1) where it is not impossible to arrive at a Valuation of the Ordinary Shares of a Company on a basis which is not calculated on the value of its tangible assets, the basis of valuation laid down in the case of the *Attorney-General of Ceylon v. Mackie*<sup>(1)</sup> does not apply; (2) it cannot be inferred that Article 81 of the Articles of Association formed part of the contract between the Company and the directors, and that a director could not sue the Company successfully for additional remuneration based on Article 81.

*Cases referred to:—*

- (1) *Attorney-General of Ceylon v. Mackie & Anor.* (1952) 2 All E.R. 775.
- (2) *Commissioners of Inland Revenue v. Ethel Maclean Crossman & Ors.* (1937) A.C. 26; (1936) 1 All E.R. 762.
- (3) *J. S. Anderson v. Commissioner of Estate Duties* (1939) M.L.J. 139.
- (4) *In re Holt* (1953, November 26) *The Times* 11; (1953) 1 W.L.R. 1488.

- (5) *In re Anglo-Austrian Printing & Publishing Union* (1892) 2 Ch. 158.
- (6) *In re New British Iron Co. Ex Parte Beckwith* (1898) 1 Ch. 324.
- (7) *Nell v. Atlanta Gold and Silver Consolidated Mines* 11 T.L.R. 407.

The following cases were also referred to at the hearing :

*In Re Dale & Plant Ltd.* 43 Ch. D. 255; *Hickman v. Kent* (1915) 1 Ch. 881; *Beattie v. Beattie Ltd.* (1938) 1 Ch. 708; and *Dean v. Prince* (1953) 3 W.L.R. 271.

#### ORIGINATING SUMMONS.

A. F. Thorne and W. S. Gilchrist for the applicants.

F. G. Charlesworth for the respondent.

The facts and arguments appear sufficiently from the judgment.

*Cur. Adv. Vult.*

**Wilson, J. :** — Mr. Jasper Bertram Young, who was a director of Boustead and Co., Ltd., a company registered in Malaya in 1921, died on the 4th February, 1948, and the question which arises in this case is : what is the amount of estate duty payable on his estate in the Federation of Malaya? There are only two points for the consideration of this Court. The first one is : what was the value of 2,500 ordinary shares in the company at the date of the death of Mr. Young? And the second one is : what was the additional director's remuneration to which his estate is entitled and to which he would have been entitled if he had lived until such time as the directors could have settled such additional remuneration after the accounts had been presented and passed? The company's financial year ends on the 28th February each year and by agreement, for the purposes of this case, the balance sheet of the company for the year ending the 29th February, 1948, which happened to be a leap year, has been used.

The amended assessment of estate duty by the Collector of Estate Duty of the ordinary shares in the company is \$150 per share, and the assessment of the additional director's remuneration is \$140,270.67 for the year ending 29th February, 1948.

I will deal first with the question of the value of the ordinary shares. In this connection I have been referred to the case of the *Attorney-General of Ceylon v. Mackie & Anor.*<sup>(1)</sup> In that case it was held that the shares of a deceased director of the company could not have been sold at the date of his death at a price

based on any higher figure than the value of the tangible assets of the company and that, therefore, that value should be adopted in the valuation of the shares for the purposes of estate duty. If that basis is to be accepted as the basis of valuation in this case, the two accountants who gave evidence, one for the Collector and the other for the executors, are both agreed that on a breakdown basis the value of an ordinary share in Boustead & Co., Ltd., on the 4th February, 1948 was \$150. However, I do not think that that is the basis on which the shares should be valued in this case. In the case of the Ceylon company which was incorporated in 1922, no dividend had been paid on preference shares since 1930 and on the management shares since 1926. In 1940, owing to war conditions the future of the rubber trade was unpredictable, and it was difficult to find anyone willing to invest large sums of money on speculation. In that case the deceased died on the 7th September, 1940, and it was held that where the past history of a business showed consistent results or a steady trend and where there had been no disruption of general business conditions, it might be possible to reach a fair valuation by theoretical calculation, but that as neither condition was satisfied a calculation on that basis was not possible.

In the case of Boustead & Co., Ltd., the circumstances are entirely different. It is true the company which was formed in 1921 only took over the partnership business of Edward Boustead & Co., in February, 1947. That, however, merely amounted to a change in name and legal entity. In my opinion, therefore, the whole history of the firm of Boustead & Co., prior to the incorporation of the company and to the sale of the partnership business to the company in 1947 must be taken into account. It is quite clear on the evidence that the standing and reputation of Boustead & Co., Ltd., is one of the highest in Malaya and that the original business was founded in 1828. The fact that there was a cessation of business for four years during the Japanese occupation appears to me to be immaterial, except that, as stated by Mr. Noble, by reason of this cessation it was impossible to regard the pre-war record of profits up to 1940 as a reliable guide to post-war profit prospects from 1946 onwards. In short, I am satisfied that the business of Boustead & Co. Ltd., could not be described as speculative and that it is not impossible to arrive at a valuation of the ordinary shares on a basis which is not calculated on the value of its tangible assets.

If I am right on that point, it is necessary to consider on what basis the value of the shares should be estimated. It has been agreed that section 20 of

the Estate Duty Enactment 1941 applies in this case and that the value of the shares shall be estimated by the price which in the opinion of the Collector, subject to appeal to the High Court, such property would fetch if sold in the open market at the time of the death of the deceased. Having rejected the basis of valuation laid down in the case of the *Attorney-General of Ceylon v. Mackie & Anor.*<sup>(1)</sup>, it becomes necessary to consider on what basis this valuation should be made. In this connection I would refer to the case of *Commissioners of Inland Revenue v. Ethel Maclean Crossman & Ors.*<sup>(2)</sup>. In that case it was decided by a majority of the House of Lords that the value of the shares for the purposes of estate duty was to be estimated at the price which they would fetch if sold in the open market on the terms that the purchaser should be entitled to be registered and to be regarded as the holder of the shares and should take and hold them subject to the provisions of the articles of association including those relating to the alienation and transfer of shares in the company. Boustead & Co., Ltd., are a private company and the shares are not quoted in the share market. The shares are in fact all owned by the directors of the company. There is a record of the transfer of certain shares in May, 1948, in September, 1948 and in April, 1949. The transfer was effected at par, in other words at \$100 per share. All these transfers were by one director to another director and in my view have no bearing on the valuation to be given on the basis of the decision in *Commissioners of Inland Revenue v. Crossman*<sup>(2)</sup> as I do not think that the directors would have considered the price which the shares would have fetched if sold in the open market on the terms that the purchaser should be entitled to be registered and should be regarded as the holder of the shares.

The next case to which I wish to refer is *J. S. Anderson v. Commissioner of Estate Duties*<sup>(3)</sup>. In that case the Appellate Court in Singapore followed the decision in the case of *The Commissioners of Inland Revenue v. Crossman*<sup>(2)</sup>. It appears to me that the provisions of the Estate Duty Ordinance which they were considering were, so far as the matters in dispute in this case are concerned, the same as the provisions of the Estate Duty Enactment, 1941, which it is agreed apply in this case. Finally, in connection with this part of the case, I would refer to the case of *In re Holt deceased*<sup>(4)</sup>. In that case the question was: what was the value of an ordinary share in John Holt & Co., (Liverpool) Ltd., a private company at the time of the death of Mr. John Alphonse Holt? In his judgment Mr. Justice Danckwerts found that the principles

on which shares in a private company were to be valued for the purpose of estate duty had been settled by the House of Lords in *Inland Revenue Commissioners v. Crossman*<sup>(2)</sup>. I would like, however, to quote this passage from the Times Report:—

"The result was that he had to enter into a dim world peopled by the indeterminate spirits of fictitious or unborn sales. It was necessary to assume the prophetic vision of a prospective purchaser at the moment of the death of the deceased, and firmly to reject the wisdom which might be provided by the knowledge of subsequent events. He had had the assistance of a number of experts who differed in their opinions, in the manner in which experts normally did, and the frankest of them admitted that certain of his calculations were simply guesswork. No possible suggestion could be made against the honesty of these witnesses, but their methods of calculation appeared to him inevitably to be uncertain and controversial."

The learned trial Judge then proceeded to discuss the position of the company and eventually making, to quote his own words, "the most intelligent guess", came to a conclusion which varied from those of all of the experts.

I am perhaps, in this case, in a slightly better position than Danckwerts, J., as it has been agreed that the balance sheet of the company for the year ending 29th February, 1948, which was not available to any would-be purchaser on the 4th February, 1948, shall be taken into consideration in assessing the value of the shares in Boustead & Co., Ltd., on the date of the death of the deceased. I assume that that it having been agreed between the parties I am entitled also to take this balance sheet into consideration. Without doing so, it would be impossible for me to come to any conclusion on the evidence as to the value of these shares as the evidence is largely based on the figures disclosed in the balance sheet.

It appears to me that in this case I have got to fix the valuation of the ordinary shares in Boustead & Co., Ltd., on the evidence before me and that if I can accept the evidence of either of the two accountants it is not necessary for me "to enter into a dim world peopled by indeterminate spirits of fictitious or unborn sales." Both accountants have given evidence at length and it has been recorded and will be available for any other Court which may have to consider this case further. Mr. Noble in his evidence has said:—"I was generally in agreement with Mr. Phillips' principles of valuation. My valuation was made on similar lines." I have come to the conclusion that I should accept the valuation of Mr. Noble. I find myself unable to agree with Mr. Phillips that the correct valuation of these shares on the 4th February, 1948 was no higher than par. Accordingly I find that the correct valuation of an ordinary share in Boustead & Co., Ltd., on that date was \$150.

The second point for decision is: what was the additional remuneration to which the deceased was entitled in respect of the financial year ending 29th February, 1948? This could not be decided until after the accounts for that year had been drawn up. The estate of the deceased has in fact received as additional remuneration \$44,415. The Collector, however, maintains that under Article 81 of the Articles of Association they were entitled to much more, in fact the sum of \$140,270.37. Article 81 provides that each director shall receive remuneration at the rate of \$12,000 per annum. The Article then continues as follows:—

"The Directors shall also be entitled by way of additional remuneration to such a sum as shall be equal to 80 per cent. of the balance of the net profits of the Company for each financial year or other period comprised in the accounts submitted to each Ordinary General Meeting of the Company which shall remain after providing for a sum sufficient to pay in respect of such year or other period a dividend at the rate of 5 per cent. gross per annum on the whole of the issued share capital for the time being whether Preference or Ordinary of the Company and whether such a dividend shall be actually paid or not such additional remuneration to be divided between the Directors in such proportions and manner as they shall agree among themselves and in default of agreement equally amongst the Directors."

If Article 81 is part of the contract of service between the deceased and the Company and the deceased did not receive the additional remuneration as provided by the Article, then he could if alive, or his executors could, sue the Company for such additional remuneration and the Collector's computation of additional remuneration would be correct. It seems to me that the sole point is as to whether or no the terms of Article 81 formed part of the deceased's contract of service. In support of the Collector's contention three main cases have been cited and these three cases are in my opinion the only ones which could be regarded as being directly in point.

In the case of *In re Anglo-Austrian Printing & Publishing Union*<sup>(5)</sup> it was held that "where a person has accepted the office of director of a Company, and has acted as such, there ought to be inferred an agreement between him and the Company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and on the part of the Company that he shall receive the remuneration and benefits provided by the articles for the directors."

In the case of *In re New British Iron Co. Ex parte Beckwith*<sup>(6)</sup>, it was held that "although certain provisions in the articles were only part of the contract between the shareholders *inter se*, the provisions were, on the directors being employed and accepting office on the footing of them, embodied in the contract between the company and the directors."

In *Nell v. Atlanta Gold and Silver Consolidated Mines*<sup>(7)</sup>, the Master of the Rolls said he thought the meaning of article 86 of the articles of association was that the board should be entitled to set apart, or keep back, or reserve for themselves for their services the sums named. The object of inserting this clause seemed to be to avoid the necessity of going to the general meeting for authority to make these payments. The board consisted of the chairman and directors, and he thought that the chairman and each of the other directors, having performed the services which it was his duty to perform, had an absolute right to receive the sum so specified as payable to him, and was entitled to sue if the money was not paid.

In that case it is to be observed that no reference was made to the question as to whether a director had been appointed and accepted office on the terms of the articles of association, and I do not think it can therefore be said to go further than the decisions in the two other cases to which I have referred. It appears to me that it may have been assumed that the director was appointed subject to the articles of association, and the point argued was an entirely different one and related to the correct interpretation of the article of association in question.

So far as the case before me is concerned, the deceased, and indeed all the other directors, had been appointed as directors before article 81 was introduced into the articles of association. The articles were adopted in July, 1947. It is quite clear from the evidence taken in England and given by three of the directors of the company that in fact little or no notice was taken of article 81 and that at the conclusion of any financial year the senior directors would decide what each director should receive by way of additional remuneration. This was a procedure which clearly had been accepted by all the directors without protest. It is also clear there never was any written or, indeed, oral contract between any of the directors and the company.

I have come to the conclusion that it cannot be inferred that article 81 formed part of the contract between the company and the directors and that a director could not sue the company successfully for additional remuneration based on article 81 of the articles of association.

It follows that I find that the additional remuneration to which Mr. Jasper Bertram Young would have been entitled if he had lived was \$44,415.

Both sides having partially succeeded I make no order as to costs but I wish to observe that even if the Collector had succeeded on both points I should have

considered making no order as to costs as he persistently failed to inform the Executors of the basis of his valuation.

*Order accordingly.*

Solicitors for the applicant: *Bannon & Bailey.*

Solicitors for the respondent: *Shearn, Delamore & Co.*

## PUBLIC PROSECUTOR v. ONG CHANG SOW.

[A. Cr. J. (Thomson, J.) January 19, 1954]

[Ipoh — Perak Criminal Appeal No. 132 of 1953]

*Dangerous Drugs Ordinance, 1952, s. 6 — Unlawful possession of raw opium — Onus of proof.*

In this case the evidence was that a party of Customs officers entered the house of the respondent and found under a bed a locked box which was later found to contain raw opium. The key of this box was not in the possession of the respondent but in the possession of a neighbour. At the close of the prosecution case the learned President acquitted and discharged the accused as he found that there was no case to answer on the charge under section 6 of the Dangerous Drugs Ordinance. He relied on the decision of the Singapore High Court in the case of *Ho Sen Seng v. Rex*<sup>(1)</sup> and held that the prosecution had not discharged the onus of showing that the respondent knew that the box contained opium.

Held: (1) the Singapore case referred to was not an authority for the learned President to follow as the decision was based on the wording of the Singapore Dangerous Drugs Ordinance which was different from the wording of the Federation Ordinance; (2) section 37(d) of the Dangerous Drugs Ordinance raises a presumption that a person is in possession of a dangerous drug if he is found to have in his custody or control anything whatever containing the dangerous drug and therefore the learned President was wrong in holding in this case that there was no *prima facie* case against the accused.

*Case referred to:—*

- (1) *Ho Sen Seng v. Rex* (1951), 2 M.L.R. 210; (1951) M.L.J. 225.

## CRIMINAL APPEAL.

*I. Talog Davies* (Federal Counsel) for the appellant.

Respondent in person.

The facts appear sufficiently from the judgment.

*Cur. Adv. Vult.*

**Thomson, J.:** — The respondent to this appeal was charged before the Sessions Court at Sitiawan with:—

(i) Unlawful possession of raw opium in contravention of section 6 of the Dangerous Drugs Ordinance, 1952; and

(ii) Unlawful possession of smoking utensils in contravention of section 10(2) of the same Ordinance.

He pleaded guilty to the second charge and was convicted, and with that conviction I am not concerned here.

On the first charge he claimed trial. At the close of the case for the prosecution, the President held that there was no case to answer and he was accordingly acquitted and discharged. Against that order of acquittal and discharge the Public Prosecutor appealed.

The appeal came on for hearing before me on 18th December when I allowed it and set aside the order of acquittal and discharge. I intimated that I would give my reasons for this course at a later stage.

Briefly, the evidence for the prosecution was that on 10th August, 1953, a party of Customs officers entered the house of the respondent on Pangkor Island where they found a number of smoking utensils and, under a bed, a locked box containing about 4 lbs. of raw opium. The key of this box was not in the possession of the respondent but in the possession of a neighbour.

At the close of the prosecution case, the President held, on the authority of the Singapore case of *Ho Sen Seng v. Rex*<sup>(1)</sup>, that the onus of proving that the respondent knew that the box contained opium lay upon the prosecution and that the prosecution evidence failed to make out a *prima facie* case on this point.

I see no reason to quarrel with the view the President took of the evidence. He was, however, definitely in error as to the law relating to the onus of proof.

In *Ho Sen Seng's*<sup>(1)</sup> case the Court was concerned with section 37(d) of the Singapore Dangerous Drugs Ordinance, 1951, which reads as follows:—

"(d) any person who is found to have had in his custody or under his control any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug."

The corresponding Section, however, of the Federation Ordinance which is as follows is different:—

"(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug."

I emphasise the words, "anything whatsoever containing" any dangerous drug. From the judgment of Brown, Ag. C.J., in *Ho Sen Seng's*<sup>(1)</sup> case, it will be noted that although these words are to be found in the former Singapore Ordinance which has now been repealed, they do not occur in the current Singapore Ordinance and that it was their omission from that Ordinance that was the *ratio decidendi* of the case in question.

Applying the provision of the Federation Ordinance which has been quoted to the facts in the present case,